ON FILE
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No. 81-1891

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MORRISON-KNUDSEN CONSTRUCTION COMPANY

and

ARGONAUT INSURANCE COMPANY,
Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

and

SONIA HILYER, WIDOW OF JAMES H. HILYER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AND APPENDIX OF AMICUS CURIAE, NATIONAL COUNCIL OF SELF-INSURERS IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND APPENDIX

Pursuant to Supreme Court Rule 36, The National Council of Self-Insurers respectfully moves for leave to file an Amicus Curiae Brief and Appendix in support of the petitioners. Counsel for petitioners and the federal respondent have consented to the filing of this brief. Counsel for respondent Hilyer has refused to consent.

The movant, National Council of Self-Insurers (the "National Council"), is an unincorporated trade association comprised of over 300 member companies and state associations including hundreds of additional self-insured companies. The membership of the National

Council is a representative cross-section of American enterprise including the steel, aluminum, automobile, utility, manufacturing, retailing and service industries. The members employ more than two million people, most of whom are covered by various federal and state workers' compensation statutes. The most recent data indicate that self-insured companies paid $2.1 billion in total compensation benefits under state and federal workers' compensation programs.

Self-insurers have a unique economic and financial stake in the LHWCA. The National Council will explain the substantial costs that its broad-based membership has incurred due to the expensive benefit levels enacted by Congress in the 1972 amendments to the LHWCA. The National Council can demonstrate significant financial hardship upon its members if fringe benefits are included in wages. In recent years, the liberal benefits enacted in the 1972 Amendments to the LHWCA and the resultant meteoric rise in compensation costs and claims have threatened the well-being of the entire program. While struggling under these burdens, self-insurers alone have experienced a 1,337% increase in LHWCA benefits paid in the last eight years. In 1981, self-insureds paid approximately 42% of the total cash indemnity benefits, *i.e.*, $80.6 million, received by claimants under the LHWCA. Thus, the National Council represents a most significant force in all workers' compensation programs in the United States.

The National Council agrees with the petitioners and the federal respondent that the United States Court of Appeals for the District of Columbia Circuit has again erroneously tampered with the core of the LHWCA in creating a new benefit structure, *i.e.* including fringe benefits into an employee's wages, which is neither permitted by the Act nor by the 55 years of administrative and judicial application of its wage-based formula. Although the parties and the various *amici* have addressed many aspects of the case, the National Council's Brief

discusses several additional issues which have not yet been presented and which merit consideration by this Court as being essential to a proper disposition of this case.

First, the National Council's Brief discusses heretofore undisclosed legislative history which demonstrates that, despite concrete recommendations by a specially created National Commission to change the wage definition to take fringe benefits into account, Congress in the 1972 Amendments to the LHWCA continued to follow the traditional concept of gross wages. Instead of an indirect fringe benefit approach, Congress in 1972 dramatically and directly increased benefits by raising the minimum and maximum rates of compensation.

The National Council has determined that a further increase in LHWCA benefits of at least 26 to 38%, *i.e.* $20-30 million, would have to be paid by self-insured employers in 1981 alone if the *Hilyer* decision is upheld. These additional costs would be directly contrary to the legislative compromise which the LHWCA struck between employers and employees that is essential to a sound workers' compensation program. Claimants would receive compensation benefits in excess of net pay. There certainly would be extensive litigation and delay attendant to unravelling those fringe benefits that are "reasonably calculable" under the *Hilyer* redefinition of "wages" and those that are not.

Second, the National Council's Brief demonstrates the costly problems associated with the *Hilyer* redefinition of wages which will foster uncertainty, delay, expense and litigation, thereby undermining the two essential elements of the LHWCA and its present wage formula, *i.e.* prompt and voluntary payment of fixed, precisely calculated benefits. Double payment of fringe benefits under the *Hilyer* decision would result in a work disincentive contrary to the purpose and intent of the LHWCA. However, if the "value received" rationale fashioned by the Court of Appeals is affirmed herein,

then "wages" should be limited to net after-tax earnings, under *Norfolk & Western R. Co. v. Liepelt*, 444 U.S. 490 (1980). The fringe benefit concept may also conflict with the Employee's Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.* (ERISA). A full explication of these issues will aid this Court in obtaining a proper resolution of this case.

The National Council of Self-Insurers considers this case to be a matter of such fundamental concern that it is seeking, for the first time in its history, leave to file an amicus brief with this Court. The National Council is greatly troubled by the delay and litigation which will follow the *Hilyer* rule and which will create an intolerable hardship on its many employees who are supposed to receive prompt payment of their compensation benefits. Although attorneys may look forward to the potential fees from the litigation that will be necessary to determine how the sweeping *Hilyer* rule will be applied, our employees need prompt determination of their compensation rights and return to their productive lives in our society.

The National Council of Self-Insurers respectfully requests that the Court grant the aforegoing Motion for Leave to File a Brief and Appendix as Amicus Curiae in support of the Petitioners.

Respectfully submitted,

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BRIEF AND APPENDIX OF AMICUS CURIAE NATIONAL COUNCIL OF SELF-INSURERS IN SUPPORT OF PETITIONERS

The National Council of Self-Insurers, appearing as *amicus curiae* in support of petitioners, urges reversal of the judgment below.

SUMMARY OF ARGUMENT

Contrary to 55 years of uniform administration of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* (hereinafter "LHWCA"), the decision below holds that employer contributions to three union benefit plans constitute "wages", as defined in the Act, and thus must be included as part of the employee's average weekly wage in computing benefits. *Hilyer v. Morrison-Knudsen Construction Co.*, 670 F.2d 208, 213 (D.C. Cir. 1981). Whatever surface plausibility may exist for such an expansive interpretation, it is completely unwarranted by the language of the statutory definition or the context in which it has been consistently applied since 1927. *Hilyer* fails to appreciate that its unprecedented introduction of variables and contingencies into the wage-based calculation is wholly at odds with the settled administration of the LHWCA, which depends upon certainty and the prompt, voluntary delivery of benefits. It ignores the reality that workers' compensation programs like the LHWCA "do not purport to provide complete compensation for the wage earner's economic loss." *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 281 (1980).

Although employer-funded benefit plans were unknown in 1927, when LHWCA "wages" were defined, their subsequent rapid growth has prompted pervasive regulatory legislation on the subject. Nevertheless, while concurrently increasing benefit levels, Congress has adhered to the wage-based formula despite awareness that benefits are calculated on the basis of gross pay, without regard to employer contributions to future benefits. Before adopting the 1972 Amendments to the LHWCA, Congress gave careful consideration to the report of a National Commission. One recommendation would have made allowance for such employer contributions to fringe benefits, but Congress deliberately elected to adhere to the traditional formula.

Congress also declined to adopt another Commission proposal which contemplated after-tax "spendable earn-

ings" as the most equitable basis for calculating LHWCA benefits. However, if *Hilyer* turns out to be a tolerable construction of the statute, the same considerations addressed in *Norfolk & Western R. Co. v. Liepelt*, 444 U.S. 490 (1980), would require a holding that after-tax earnings provide the only realistic measure of a worker's average weekly wages.

Moreover, *Hilyer* could adversely affect all parties concerned with the administration of the Act. Members of the National Council of Self-Insurers employ in excess of two million workers in the major areas of the United States workforce. These self-insurers are bearing a disproportionate financial burden under the LHWCA, as amended in 1972. They have seen a 1,337% increase in LHWCA cash indemnity payments made during the last nine years, which totalled $80.6 million in 1981. The new wage definition of *Hilyer* would have added an increased cost of LHWCA benefits to self-insurers estimated at 26-38%, i.e., $20-30 million, in 1981 alone. This increase in benefits authorized by the Court of Appeals is contrary to the intent of Congress. The application of *Hilyer* will increase litigation thereby preventing prompt payment of benefits to all employees under the Act.

If further demonstration is needed that *Hilyer* is a step in the wrong direction, the very existence of ERISA argues strongly against the unpredictable extension of the LHWCA into the realm of benefit plan funding. The decision in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), as recently applied by the Second Circuit suggests that predicating workers' compensation liability upon the level of plan funding may run afoul of ERISA in several respects discussed herein. Since this Court will explore again this term the inherent tension between ERISA and disability compensation statutes, *Kramarsky v. Delta Air Lines, Inc.*, 102 S. Ct. 1968 (1982) (noting prob. juris.), sound judicial policy requires a circumspect approach to the LHWCA which will avert a collision course with another Congressional program.

ARGUMENT

I. JUDICIAL TAMPERING WITH THE WAGE-BASED FORMULA FOR MEASURING LHWCA BENEFITS, IN UNPRECEDENTED DISREGARD OF SETTLED ADMINISTRATION OF THE ACT, CREATES UNCERTAINTY WHERE NONE NOW EXISTS.

Once again, the United States Court of Appeals for the District of Columbia Circuit has superimposed its subjective notions of reasonableness and social welfare upon the law of workers' compensation. In *Potomac Electric Power Co. v. Director, OWCP*, 606 F.2d 1324 (D.C. Cir. 1979), citing "humanitarian objectives" and recent trends, it misconstrued the LHWCA as providing a "remedial alternative" measure of compensation whenever scheduled benefits prove "inadequate". *Id.*, at 1327-28. This Court reversed. *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268 (1980).

In *Riley v. U.S. Industries/Federal Sheet Metal, Inc.*, 627 F.2d 455 (D.C. Cir. 1980), the same Court held that when "something unexpectedly goes wrong with the human frame" of a worker, even when awaking in his own bedroom, it satisfies the LHWCA's definition of a compensable "injury". *Id.*, at 458. Again, this Court reversed. *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 102 S. Ct. 1312 (1982).

Now, in its latest rendition of the LHWCA, 55 years after its enactment, the Court of Appeals for the District of Columbia Circuit has decided that statutory "wages" ought to be expanded to include the value of contingent benefits, which depend upon future eligibility and are supplemental to wages. It held that an employer's negotiated costs of funding union pension and welfare plans "amount to value received" by employees and "must be included as part of the employee's average weekly wage in computing the compensation due under the Act." *Hilyer v. Morrison-Knudsen Construction Co.*, 670 F.2d 208, 213 (D.C. Cir. 1981).

The *Hilyer* decision must be reversed because it undermines the core assumption that all LHWCA benefits are calibrated to statutory "wages", not to indirect "values" conferred by the employment. Section 2(13) of the LHWCA, unchanged since 1927, provides:

> "Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer.

33 U.S.C. § 902(13). Not a single word in that definition has been changed, added, or deleted since the LHWCA was enacted. State workers' compensation programs, also linking benefits with past "wages", have been functioning even longer. All of them are pragmatic endeavors, designed simply to provide certain and prompt benefits. These systems look to the previous "wages" on which the worker and family actually lived and assign a practical meaning to that term.

Section 2(13) of the LHWCA defines "wages" to embrace all cash earnings (wages, salaries, and tips), plus any tangible necessities (room, board, or similar advantage) actually received from the employer, directly and unconditionally. Those are the "wages" on which the worker and his family once depended. Upon his death or disability, all LHWCA benefits are measured by the average weekly "wages" no longer received. 33 U.S.C. § 910.

It is astonishing that the Court of Appeals would announce, in essence, that benefits have been miscalculated for more than half a century. For much of that period, noncontributory fringe packages have afforded group protection to workers against various contingencies. While a worker is alive and well, however, the "value" of such protection lies in the future, after he is no longer able to earn "wages". The cost to his employer forms no part of

his family's current standard of living and confers no personal right to receive any portion of the sums contributed on behalf of the group. By equating "values" never received by an employee during his work-life with the "wages" which he did receive, the Court of Appeals has supplied a novel meaning to a statutory definition which has controlled every LHWCA benefit determination since 1927.

That Court's unprecedented notion that "wages" defined by the LHWCA includes "values" beyond "wages" represents yet another "recent development surfacing for the first time almost 50 years after its enactment." *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 279 (1980). The suggestion that the employer cost of fringe benefits should be factored into "average weekly wages" never surfaced before because nobody associated with the LHWCA, including claimants and their resourceful attorneys, perceived in it any merit. Since workers covered by the LHWCA are often employed pursuant to collective bargaining agreements exacting such employer contributions, a fact of which Congress has been aware for decades,[1] the lack of any judicial or administrative precedent for the contention should have argued forcefully against its belated adoption.[2]

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[1] Indeed, the 1972 Amendments to the LHWCA contained an explicit reference in § 17(b) thereof to trust funds which comply with 29 U.S.C. § 186(c) and are established by a collective bargaining agreement, as authorized by the Labor Management Relations Act of 1947. *See* 33 U.S.C. § 917(b). Since 1947, Congress has legislated pervasively with respect to employer-funded pension and welfare plans. *See* Welfare and Pension Plans Disclosure Act of 1958, 29 U.S.C. § 301, *et seq.*, Employee's Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*

[2] In its futile quest for precedential support, the Court of Appeals turned to the state level, where reported opinions dealing with every aspect of workers' compensation laws are truly voluminous. It managed to find a single opinion lending support to its position that employer contributions should now become part of weekly wages in calculating compensation benefits. *Hite v. Evans Products Co.*,

The Court of Appeals treated the contention as raising "a question of first impression" which "has apparently not been addressed before." 670 F.2d at 209, 211. That observation was not entirely accurate. Even before the 1972 Amendments to the LHWCA, the Department of Labor felt "bound by [the] past practice of excluding those fringe benefits from wages" and reported that any departure from that practice "is up to Congress" to prescribe.[3] Following those Amendments, which left intact the "wages" definition as well as the "average weekly wages" formula, the Benefits Review Board has adhered repeatedly to the position that employer-paid fringe benefits are not included in wage calculations.[4] More significant is the frequent application of departmental policy in routine claims adjudication. Because the Department of Labor, upon request of any claimant or employer, provides information and assistance relating to LHWCA

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34 Mich. App. 247, 191 N.W.2d 136, 139 (1971). Apart from Michigan legislation which nullified *Hite* by excluding "any fringe or other benefits" from "average weekly wage" determinations, *id.*, 191 N.W.2d 136, 138 n.2, *Hite's* precedential value is offset by subsequent decisions to the contrary in *Still v. Industrial Commission*, 27 Ariz. App. 142, 551 P.2d 591, 593-94 (1976), and *Sunland Training Center v. Irving*, 384 So.2d 745 (Fla. App. 1980). No court of final result has ever addressed the issue resolved below.

[3] *See* U.S. Department of Labor, Bureau of Employees' Compensation, Wage and Labor Standards Administration, LS/HW Memorandum No. 32 (June 17, 1968), p.3, reprinted in appendix to American Insurance Association Amicus Br. Supporting Pet. for Cert., pp. 1a to 4a.

[4] In addition to *Hilyer* itself, the Benefits Review Board rejected arguments that LHWCA wages include employer costs of fringe benefits in *Waters v. Farmers Export Co.*, 14 BRBS 102 (1981) (appeals pending in 5th Cir., Nos. 81-4258 and 81-4273); *Freer v. Duncanson-Harrelson Co.*, 9 BRBS 888 (1979), *rev'd sub. nom., Duncanson-Harrelson Co. v. Director, OWCP*, 686 F.2d 1336, 1343-46 (9th Cir. 1982); *Lawson v. Atlantic & Gulf Grain Stevedores Co.*, 6 BRBS 770 (1977). Following *Hilyer*, the Board has reversed its own position, *Minick v. Levin Metals Corp.*, No. 80-835 (Apr. 28, 1982), reconsideration granted (July 29, 1982).

coverage and compensation, 33 U.S.C. § 939(c), thousands of claims have been resolved upon the official assurance that employer contributions to fringe benefits are not part of average weekly wages.[5]

Without a firm grasp of legislative history or administrative practice, the Court of Appeals treated Section 2(13) of the LHWCA as an invitation to search for hidden implications not apparent to those who enacted or administer the law. It found that the "wages" definition "clearly implies that the values received by an employee that are readily identifiable and calculable should be included in the determination of the average weekly wage." 670 F.2d at 211. By isolating the "wages" definition from the rest of the LHWCA the Court of Appeals created an elastic meaning which embraced any benefit, however contingent, having "substantial economic value to the employees." *Ibid.* That conclusion was attributed to *dicta* in *United States v. Carter*, 353 U.S. 210 (1957), which actually held that union fund contributions enjoy protection under a Miller Act bond because that "Act . . . does not limit recovery on the statutory bond to 'wages' ". *Id.*, 353 U.S. at 217.[6]

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[5] The Court of Appeals relied on views since repudiated by the Department of Labor. Federal Respondent's Br. Supporting Pet. for Cert., p. 4 n.2. The Department was unsuccessful in urging the Ninth Circuit to reject *Hilyer*. *Duncanson-Harrelson Co. v. Director, OWCP*, 686 F.2d 1336, 1343 (9th Cir. 1982).

[6] *See United States v. Embassy Restaurant, Inc.*, 359 U.S. 29, 34-35 (1959), distinguishing *Carter* and giving a construction to the term "wages" which *Hilyer* found "inappropriate here." 670 F.2d at 213.

Hilyer is perhaps the only significant LHWCA decision resting exclusively upon judicial opinions that addressed no aspect of the Act. Even this insecure reliance was badly misplaced. For example, the Court of Appeals stated unequivocally that *W. W. Cross & Co., Inc. v. NLRB*, 174 F.2d 875, 878 (1st Cir. 1949), *"held* that *contributions* to a group health insurance plan were 'wages' for the purposes

The Court of Appeals rationalized its expansive treatment of "wages" upon an assumption that Congress intended to include all identifiable values in wage calculations:

> * * * The purpose of the Longshoremen's Act is to provide prompt compensation for injured employees or their families. Congress chose to carry out this design by including in the compensation formula *all* of the identifiable value, in whatever form it may appear, that the employee was receiving in return for his labor at the time of the injury. * * *

670 F.2d at 213 (court's italics). Having characterized employer contributions as "valuable benefits, *in addition to* hourly rates of pay" and as an "important part of the employer's labor *cost*", 670 F.2d at 212 n.7 (italics

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of the mandatory bargaining provision of the NLRA as amended, 29 U.S.C. §§ 151 *et seq.*" 670 F.2d at 211 n.6 (italics added).

However, neither *W.W. Cross* nor *Inland Steel v. NLRB*, 170 F.2d 247, 251 (7th Cir. 1948), *aff'd*, 339 U.S. 382 (1950), also cited by *Hilyer*, 670 F.2d at 212 n.6, held anything of the kind. Both cases held that the *benefits* of group plans are "wages" *or* "other conditions of employment", *not* that *contributions* to such plans may be so described.

Any doubt as to the scope of those holdings, and the egregiousness of the *Hilyer* misstatement, was put to rest in *Sylvania Electric Products, Inc. v. NLRB*, 291 F.2d 128 (1st Cir.), *cert. denied* 368 U.S. 926 (1961). Judge Woodbury, who authored the *W.W. Cross* decision, again wrote the unanimous opinion in *Sylvania*:

> The court held in *W.W. Cross & Co. v. NLRB*, *supra*, that the *benefits* of an employee group insurance plan were 'wages' within the meaning of that word as used in the pertinent sections of the Act * * *. We adhere to that decision. * * * It is quite another matter, however, to go further and endorse the * * * conclusion that the *cost* of a group employee insurance program defrayed entirely by the employer also constitutes 'wages' to employees. In the absence of any controlling authority, or indeed, of any judicial authority cited or discovered by our own efforts, we decline to take that step. *Id.*, 291 F.2d at 131 (court's italics). *See also, Western Massachusetts Elec. Co. v. NLRB*, 573 F.2d 101, 109 (1st Cir. 1978).

added), the Court of Appeals held that such expenditures, over and above salaries, easily satisfied its own all-embracing definition of "wages". 670 F.2d at 213.

> In conclusion, it is clear that if the value received by the employee is reasonably identifiable and calculable, then it must be included in the average weekly wage of the employee.

Apart from the demonstrable fact that Congress never intended such a result, and indeed legislated on the assumption that fringe benefits would *not* be factored into the "wages" equation, the *Hilyer* opinion betrays an unwillingness to comprehend the limited objectives of the LHWCA. The unsupportable premise that Congress intended to provide a complete remedy for all economic loss, by reaching "*all* of the identifiable value, in whatever form it may appear", *ibid.*, has been rejected before. In *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268 (1980), it was necessary to point out to the same Court of Appeals the "inaccuracy" of assuming "that the sole purpose of the Act was to provide disabled workers with a complete remedy for their industrial injuries" (449 U.S. at 281):

> The LHWCA, like other workmen's compensation legislation, is indeed remedial in that it was intended to provide a *certain* recovery for employees who are injured on the job. It imposes liability without fault and precludes the assertion of various common law defenses that had frequently resulted in the denial of any recovery for disabled laborers. While providing employees with the benefit of a more *certain* recovery for work-related harms, statutes of this kind *do not purport to provide complete compensation for the wage earner's economic loss.* On the contrary, they provide employers with *definite and lower limits* on potential liability than would have been applicable in common-law tort actions for damages. None of the categories of disability covered by the LHWCA authorizes recovery measured by the full loss of an injured employee's earnings; even those in the most favored categories may recover only

> two-thirds of the actual loss of earnings. It therefore is *not* correct to interpret the Act as guaranteeing a completely adequate remedy for all covered disabilities. Rather, like most workmen's compensation legislation, the LHWCA represents a compromise between the competing interests of disabled laborers and their employers. * * *

449 U.S. at 281-82 (italics added; footnotes omitted).

In short, "[t]he LHWCA clearly does not attempt to compensate injured employees for their entire loss." *Id.*, 449 U.S. at 281 n.23. The "value" of the employer's cost of fringe benefits may or may not be regarded as an appropriate component of damages in a tort action. However, the employer's cost, even if identifiable and calculable, is not a proper concern of the LHWCA, in which "the maximum compensation available is expressly designated to be less than an employee's actual economic loss." *Id.* The statutory preoccupation with a worker's average weekly "wage or salary", 33 U.S.C. § 910(a), (b), as the sole basis for calculating all benefits, implies the exclusion of "values" whose worth depends upon future variables and contingencies. The simplicity and ease of administration of excluding intangibles from "average weekly wages" is "consistent with the employees' interest in receiving a prompt and certain recovery for their industrial injuries as well as with the employers' interest in having their contingent liabilities identified as precisely and as early as possible." *Id.*, 449 U.S. at 282.

Viewed in the entire context of the LHWCA, the statutory definition of "wages" must be interpreted as a determinate and mechanical formula for calculating benefits, not as a complete remedy for all forms of economic loss. Generally, "the average weekly wage of the injured employee at the time of the injury *shall* be taken as *the* basis upon which to compute compensation" in all death or disability cases. 33 U.S.C. § 910 (italics added). The statutory formula contemplates multiplying "the average daily wage or salary" by the number of

work days per year, 33 U.S.C. § 910(a) and (b), and then dividing the total by 52. 33 U.S.C. § 910(d).

The LHWCA requires the Secretary of Labor to determine annually the "national average weekly wage", 33 U.S.C. § 906(b)(3), defined as "the national average weekly earnings of production or nonsupervisory workers on private nonagricultural payrolls." 33 U.S.C. § 902(19). The national average is the statutory basis for setting floors and ceilings for all benefit categories. Benefits must be adjusted upward each year in accordance with any increase in the national average weekly wage. 33 U.S.C. § 910(f), (g) and (h).

Obviously, the statutory obligation of compiling a "national average weekly wage" would become an impossible task if the myriad of contingent benefits had to be taken into account. In accordance with historic practice and administrative necessity, the Secretary of Labor has never included employer contributions to benefits in calculating the national average weekly wage. The Secretary's focus upon prevailing salary rates plainly coincides with the Congressional understanding of national average weekly wages. In setting maximum and minimum benefit levels for nonappropriated fund employees under the LHWCA, for example, Congress expressly chose the rates of "basic pay" established by 5 U.S.C. § 5332 for Federal employees. 33 U.S.C. § 906(c). Those flat salary rates, which exclude the value of fringe benefits, are thus treated as equivalent to the "national average weekly wage" formula.

The whole purpose of the LHWCA is to provide a voluntary system of fixed benefits based upon the average weekly wage actually received by the employee. The classic compromise of competing interests, which led to its original enactment and underscores every amendment thereto, rules out judicial embellishments which would set a premium on variables and contingencies. The decision below misconstrued the terms of the LHWCA and the certainty intended by Congress.

II. IN ENACTING THE 1972 AMENDMENTS TO THE LHWCA, CONGRESS RECOGNIZED THAT EMPLOYER CONTRIBUTIONS TO FUTURE BENEFITS ARE NOT INCLUDED IN DETERMINING THE AVERAGE WEEKLY WAGE AND ADHERED TO THAT CONSTRUCTION OF THE ACT.

A. Legislative Background.

Congress has amended the LHWCA ten times since its original enactment in 1927, including a comprehensive revision in 1972, but has not once changed the statutory definition of "wages", 33 U.S.C. § 902(13), or modified "average weekly wages" as the basis of all benefit calculation. That terminology was lifted bodily from the New York Workmen's Compensation Law of 1922, on which the LHWCA was patterned. Although hearings in Congress before passage of the LHWCA were distinctly adversarial in nature, the legislative history is singularly unilluminating. Battle lines were drawn over other topics. The definition of "wages" and concept of "average weekly wages" were adopted without discussion or debate.

When the LHWCA was enacted in 1927, cash wages indeed constituted virtually the only type of remuneration paid to employees. Group life insurance, hospitalization, disability benefits, medical care, pensions, and comparable fringe benefits were essentially unknown before World War II, when it became a widespread practice to substitute them for wage increases. Congress itself has noted this commonplace means of circumventing regulations of the National War Labor Board, which restricted wage increases for the duration of hostilities.[7] Likewise, the development of union pension, welfare, and retirement trust funds, financed exclusively by employer contributions, took place long after the original enactment

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[7] See S. Rep. No. 963, 88th Cong., 2d Sess. (1964), reprinted in 2 *U.S. Code Cong. & Admin. News 1964*, p. 2340; H. Rep. No. 93-533, 93rd Cong., 2d Sess., p. 2 (1974), reprinted in 3 *U.S. Code Cong. & Admin. News 1974*, p. 4640.

of the LHWCA. Congressional reaction was swift.[8] However, as late as 1958, the growth of employer-funded benefit plans during the past decade was described as "phenomenal".[9]

In ascertaining the legislative intent underlying the "wages" definition and "average weekly wages" formulation adopted in 1927, it must be recognized that Congress scarcely could have anticipated these subsequent developments. *See Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 280 (1980). Long after the advent of noncontributory benefit plans, there was strong authority holding that employer contributions to such plans did not constitute "wages" within any generally accepted meaning of that term. *See, e.g., United States v. Embassy Restaurant, Inc.*, 359 U.S. 29, 33 (1959). *Sylvania Electric Products, Inc. v. NLRB*, 291 F.2d at 131. Such payments are referenced to the actuarial needs of the fund, not the money rate of recompense. Employees have no choice as to participation and no option of demanding that the employer's contribution be paid over to them as a substitute for eligibility. *E.g., International Brotherhood v. Daniel*, 439 U.S. 551, 553 (1979).

When uncertainty has arisen whether such employer contributions should be treated as "wages" or not, Congress has not hesitated to eliminate all doubt. In some instances, employer contributions to pension and welfare plans have been specifically exempted from the statutory definition of "wages". Internal Revenue Code of 1954, 26 U.S.C. § 3401(a)(12)(A).[10] In other instances, Congress has seen fit to enact statutory definitions which do

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[8] Section 302(c), Labor Management Relations Act of 1947, 29 U.S.C. § 186(c).

[9] S. Rep. No. 1440, 85th Cong., 2d Sess. (1958), reprinted in 3 *U.S. Code Cong. & Admin. News 1958*, p. 4140.

[10] *See University of North Dakota v. United States*, 603 F.2d 702 (8th Cir. 1979); *Joint School District No. 1 v. United States*, 577 F.2d 1089 (7th Cir. 1978).

classify such employee contributions as "wages". For example, the Davis-Bacon Act of 1931 had to be amended in 1964, 40 U.S.C. § 276a, to include fringes due to the stated belief of the sponsors that such "fringe benefits were unknown when this Act became law a third of a century ago" and that, because "wages" are paid unconditionally, "fringe benefits that are contingent in nature cannot now be included in the wage determinations." [11]

As noted, in the decades following passage of the LHWCA, Congress saw fit to redefine "wages", as used in some other statutes, in order to take account of contributions to pension and welfare plans. And yet it concurrently amended the LHWCA to increase benefit levels without changing the definition of "wages" in that Act.[12] Any complacent assumption that 33 U.S.C. § 902(13) was a flexible catchall, broad enough to accommodate employer contributions, could not possibly have survived this Court's decision in *United States v. Embassy Restaurant, Inc.*, 359 U.S. 29 (1959), or its reaffirmation in *Joint Industry Board of the Electrical Industry v. United States*, 391 U.S. 224 (1968). Both cases proclaimed that such contributions do not have the customary attributes of "wages" and, being owed to trustees and *not* the employees, provided no support to the workmen in periods of financial distress.

B. The 1972 Amendments.

In the wake of those decisions, the Senate Labor and Public Welfare Committee conducted hearings and research which led it to conclude that "workmen's compensation benefit levels do not appear to have kept pace with increasing wage levels and the rising cost of living faced by American workers, with the result that benefits usu-

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[11] See S. Rep. No. 963, 88th Cong., 2d Sess., reprinted in 2 *U.S. Code Cong. & Admin. News 1964*, p. 2340.

[12] Act of June 24, 1948, ch. 623, §§ 1, 3, 62 Stat. 602; Act of July 26, 1956, ch. 735, §§ 1, 4, 70 Stat. 654, 655; Act of July 14, 1961, Pub. L. 87-87, §§ 1, 2, 75 Stat. 203.

ally replace only a small fraction of the income lost to disability, injury or disease." [13] Pursuant to its recommendations, Congress established the National Commission on State Workmen's Compensation Laws and directed a year-long study of the adequacy of existing compensation programs. 29 U.S.C. § 676. The Commission completed its work on time. In reporting the 1972 Amendments to the LHWCA, committees of the House and Senate acknowledged that they had "given the most careful consideration to the recommendations of the National Commission on State Workmen's Compensation Laws contained in its report issued on July 31, 1972." [14]

Many key recommendations contained in the Commission Report for liberalizing monetary benefits were enacted into law: e.g., the elimination of fixed-dollar maximum ceilings on benefits and the substitution of a phased-in maximum set at 200% of the national average weekly wage, 33 U.S.C. § 906(b)(1); provisions in so-called second injury cases to encourage the employment of handicapped workers, 33 U.S.C. §§ 908(f), 944; removal of any cumulative maximum limit on partial disability benefits, 33 U.S.C. § 914; reduction from four weeks to two of the period after which retroactive benefits are payable, 33 U.S.C. § 906(a).[15]

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[13] S. Rep. No. 91-1282, 91st Cong., 2d Sess. (1970), reprinted in 3 *U.S. Code Cong. & Admin. News 1970*, p. 5200.

[14] The identical language appears in the House and Senate Committee reports. H. Rep. No. 92-1441, 92nd Cong., 2d Sess., p. 2 (1972), Legislative History of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972 (prepared for the Senate Committee on Labor and Public Welfare by the Subcommittee on Labor), p. 208 (1972) (hereinafter "Leg. Hist."), reprinted in 3 *U.S. Code Cong. & Admin. News 1972*, p. 4699; S. Rep. No. 92-1125, 92d Cong., 2d Sess., p. 2 (1972), Leg. Hist., p. 64.

[15] H. Rep. No. 92-1441, pp. 10, 12, Leg. Hist., pp. 216, 218; S. Rep. No. 92-1125, pp. 4, 5, 7, 12, 14, 15, 16, (1972), Leg. Hist., pp. 66, 67, 69, 74, 76, 77, 78. *The Report of the National Commission on State Workmen's Compensation Laws* (July 13, 1972), pp. 59 (Para. R3.5), 62 (Para. R.3.8, R.3.9, R3.10), 64-65 (Para. 3.15,

One of the major purposes of the 1972 Amendments was to improve the level of benefits deemed inadequate by all parties. *P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 73 n.3 (1979). Congress met the perceived need, forthrightly and directly. It raised "benefits to a level commensurate with present day salaries and with the needs of injured workers whose sole support will be payments under the Act." *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 262 (1977).

Congress did not broaden the basic "wages" formula for calculating benefits. *Director, OWCP v. Rasmussen*, 440 U.S. 29, 32 (1979). Although it was apparent during the committee hearings that the value of fringe benefits was not considered a part of average weekly wages,[16] the 1972 Amendments did not alter the statutory "wages" definition, 33 U.S.C. § 902(13), and indeed reaffirmed the concept of salary-based "average weekly wages". By requiring the Secretary of Labor to calculate annually a "national average weekly wage", 33 U.S.C. § 906(b)(3), as the yardstick for maximum and minimum benefit levels and for computing annual adjustments in benefits, Congress approved implicitly the continued usage of gross pay as the determinant of "wages".

However, it would be a mistake to assume that Congress failed to consider alternative proposals to change

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R3.16, R3.17). See remarks of Senators Williams and Eagleton, cosponsors of S.2318, immediately before passage, in Leg. Hist., pp. 371, 372, 374-76, 383-84, to the effect that the 1972 Amendments to the LHWCA were designed to implement the National Commission's recommendations.

[16] *See, e.g.*, the testimony of an industry representative, Ralph M. Hartman, a former Director of the Office of Workers' Compensation Programs, Department of Labor, who then indicated that the average weekly wage is calculated without reference to additional weekly employer costs of fringe benefits, then approximately $25.00 per week. Hearings on S. 2318, S. 525 and S. 1547 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess., pp. 181-182 (1972). See also, *id.*, tables I and II, pp. 98-99.

the traditional approach by utilization of more sophisticated formulae. A major recommendation of the influential National Commission addressed the omission of employer contributions to fringe benefits, coupled with the failure to take into account income taxes. The Commission challenged the traditional, percentage-of-gross wages formula for computing benefits. "The value of a job to a worker cannot be measured simply by his wage or salary." *The Report of the National Commission on State Workmen's Compensation Laws* (July 31, 1972) (hereinafter *"Commission Report"*), p. 54. A better system, it concluded, would "recognize the value of the supplements or fringe benefits which have been introduced since the two-thirds formula was established, and which are not included in gross pay." *Id.*, p. 18. Among these "supplements" identified were "employer contributions to private pension, health, unemployment, and welfare funds." [17]

On the other hand, the *Commission Report* observed that the traditional system tended to overcompensate workers by failing to deduct for income and social security taxes. *Id., pp.* 18, 54-55. Accordingly, as its recommendation R3.1, the *Commission Report* proposed that weekly wages be set at 80% of a worker's "spendable" weekly earnings.[18] The suggested after-tax formula made allowance for fringe benefits by raising the percentage from two-thirds to 80%. It explained:

> Benefits usually are computed as a percentage of gross pay, rather than spendable earnings. Tax fac-

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[17] *Commission Report*, p. 55, table 3.1. Other supplements to wages and salaries included employer payments under the Social Security, federal and state unemployment insurance, railroad retirement and unemployment insurance, compensation for injuries, and a few minor items. *Ibid.*

[18] *Commission Report*, p. 56 (¶ R3.1). The 80% of "spendable weekly earnings" formula would be applicable to benefits for temporary total disability, permanent total disability, and death. *Id.*, pp. 60 (¶ R3.6), 64 (¶ R3.13), 71 (¶ 3.20).

> tors and the number of dependents contribute to inequities in this approach, and the inequities would be compounded if higher benefits were paid. The traditional payments are two-thirds of pretax wages. Benefits calculated as 80 percent of spendable earnings would better reflect the worker's preinjury economic circumstances and cost the system little more. The small increase in cost would in any event recognize the value of the supplements or fringe benefits which have been introduced since the two-thirds formula was established, and which are not included in gross pay. *Id.*, p. 18.

Because "[o]bvious administrative difficulties make this ideal solution impractical," *id.*, p. 56, the Commission alternatively sanctioned the continued use of the "simpler, though generally inferior, formula" of correlating benefits to a percentage of gross weekly wages. *Id.*, p. 57 (¶ R3.2). *See, id.*, pp. 60 (¶ R3.7), 64 (¶ R3.12), 71 (¶ R3.21).

That Congress chose the latter alternative and elected to retain the traditional, simpler approach, is manifest from the face of the LHWCA. The Commission's preferred formula, keyed to "spendable weekly earnings" with a percentage override to factor in "supplements", was a proverbial can of worms which Congress was not prepared to open. None of the bills introduced in the House and Senate sought changes in the "average weekly wages" formula. The basic formula for determining compensation—66⅔% of the employee's average weekly wage—was left unchanged by the 1972 Amendments. *Director, OWCP v. Rasmussen*, 440 U.S. 29, 32, 33 (1979).

By the 1972 Amendments to the LHWCA, Congress dealt with the adequacy of benefit levels in its own fashion. Its design to increase benefits directly by a variety of expedients, without disturbing the basic formula for calculating them, should have been honored below. Congress attached priority to simplicity, ease of

administration, and confinement to "wages" as the standard in 1972, which had not been changed since 1927. *Cf., Central Illinois Public Service Co. v. United States*, 435 U.S. 21, 31 (1978). See *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. at 280. This legislative priority was not open to debate in the Court of Appeals in 1981. The desirability of considering employer contributions to fringe benefits in calculating the average weekly wage, that is whether such contributions "from the viewpoint of social welfare should be counted as part of that legal wage, is not for judicial decision." *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386, 388-89 (1942). *See Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. at 284 n.28.

III. THE *HILYER* RULE AS APPLIED INCREASES BENEFITS BEYOND THE LEVEL PERMITTED BY CONGRESS THEREBY UNDERMINING CERTAIN AND PROMPT LHWCA PAYMENTS.

The LHWCA embodies the classic workers' compensation trade-off between certain and prompt benefits for the injured employee and the limitation of the employer's liability according to a wage-based formula that determines monetary benefit levels. *See Murphy v. Woods Hole, Martha's Vineyard & Nantucket Steamship Authority*, 545 F.2d 235, 238 (1st Cir. 1976). This cardinal principle of risk-sharing has not been changed in 55 years by any of the many amendments to the Act. Rather, the 1972 Amendments preserved this statutory compromise while directly increasing compensation benefits for covered employees, *P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69 (1979), and minimizing the need for litigation as a means of providing compensation for injured workers. *Rodriguez v. Compass Shipping Co., Ltd.*, 451 U.S. 596 (1981).

Congress could have increased benefits by redefining wages to include fringe benefits. Instead Congress preserved the existing definition of wages and

directly raised the maximum and minimum benefits payable under the Act.[19] In recent years, benefit levels have soared beyond reason and may now provide a disincentive to return to work, since claimants can receive benefits that approach or even exceed net earnings.[20] Congress, however, intended to double LHWCA benefits so that 90% of the disabled workers covered under the Act would receive 66⅔% of their average weekly wages.[21] The *Hilyer* redefinition of wages would effectively write this limitation upon benefits out of the LHWCA.

Following the 1972 Amendments, the cost of compensation and medical benefits under the LHWCA dramatically increased 566% between 1973 and 1981 upon payments of $33 million in 1972 to $220 million in 1980.[22] Cash indemnity payments under the 1972 Amendments increased from $37,824,475.04 in 1973 to $189,595,663.98 in 1981, an increase of approximately 400% in less than a decade which is depicted in the Graph in Appendix A.

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[19] Section 6(b)(3) of the LHWCA, as amended in 1972, requires the Secretary of Labor to determine the national average weekly wage (NAWW). The compensation rate is based upon 200% of the NAWW. 33 U.S.C. § 906(b). The rate increase was phased in over a three-year period by raising the maximum benefits from 125% in 1973 to 200% in 1975 of the NAWW. Under the statutory formula, the maximum compensation rate has increased 650% from a $70.00 pre-1972 rate to the present rate of $524.70.

[20] *See Report by the Comptroller General* HRD-82-35 (Apr. 1, 1982) p. 13. (*hereinafter "Comptroller General's Report"*). Under the pre-*Hilyer* definition of wages, compensation paid under the Act equalled 88% of pre-injury take-home pay and high income employees received benefits equalling 96% of take-home pay. The growth of benefit levels approaching after tax spendable income is attributed to the recent growth in taxes.

[21] S. Rep. No. 92-1125, p. 5 (1972), Leg. Hist. (*supra* n.14), p. 67 (1972). *See Director, OWCP v. Rasmussen*, 440 U.S. 35 (1979).

[22] Comptroller General's Report, p. 5.

The post-1972 increase in benefits under the Act subjects self-insured employers to unanticipated tremendous new liabilities. Self-insured employers recently have been shackled with a startling 1,337% increase in cash indemnity payments, from $5.7 million in 1973 to $80.6 million in 1981.[23] An independent study dramatically demonstrates the immediate impact of the 1972 Amendments in which compensation benefits have escalated faster than wages.[24] From 1970-1976, the average shipyard employee's wages increased 8.5% annually while compensation paid under the Act increased by 31.5% annually. Moreover, after the 1972 Amendments, benefits paid to shipyard employees were 256% higher than during the prior three years.[25]

In refusing to sanction a remedy not expressly provided by the LHWCA, this Court stated that the "comprehensive character of the procedures outlined in the Act precludes the fashioning of an entirely new set of remedies to deal with an aspect of a problem that Congress expressly addressed." *Rodriguez v. Compass Shipping Co. Ltd.*, 451 U.S. at 614. The same reasoning requires the reversal of the *Hilyer* decision which, in effect, creates a *new benefit structure* that was considered but not adopted by Congress in 1972.

Self-insured companies in particular will be adversely affected by *Hilyer's* judicial legislation. Self-insurers are already overburdened by massive benefit payouts. An informal survey of the membership of the National Council reveals that the inclusion of fringe benefits into LHWCA wages under *Hilyer* would result in an immediate increase of self-insurers' cash indemnity payments,

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[23] *See* App. D, Letter from Neil A. Montone, Associate Director, Longshore and Harbor Workers' Compensation Programs, Department of Labor.

[24] *See* App. E, Tillinghast, Nelson & Warren, Inc., *A Report on Longshoremen's and Harbor Workers' Compensation Act Experience* October 1978," at p. 23, 24.

[25] *Ibid.*

estimated conservatively between 26 and 38% in 1981 alone, *i.e.* an additional $20 to 30 million in compensation payments by self-insurers as depicted in the Graph in Appendix B.

When all payors under the Act are considered, the *Hilyer* rationale would cost at least an *additional* $50 million to $72 million in 1981. An increase in benefits of this magnitude must not be judicially engrafted onto the LHWCA but rather requires careful and deliberate consideration by Congress of numerous economic and financial factors and, importantly, the effect upon the administration and policies of the Act.

Moreover, implementation of the novel *Hilyer* decision would affect virtually every compensation program in the nation. Professor Larson points out in his authoritative treatise that "[i]n almost every jurisdiction the beginning point in calculating the amount of benefits is the 'average weekly wage'." 2 Larson, *Workmen's Compensation Law*, § 60.11(a) (1981). The Social Security Administration reported that 78.6 million workers were covered by workers' compensation laws during an average month in 1979.[26] The total cost to such employers in 1979 was $20 billion of which claimants received $11.9 billion in benefits, with $1.7 billion being paid by self-insurers. The latest projections indicate that workers' compensation cost employers $22 billion in 1980 and that workers collected $13.3 billion in benefits.[27] The staggering 240% increase in self-insurers compensation costs is depicted in the Graph in Appendix C.

The *Hilyer* decision will increase costs and prevent the efficient administration of the LHWCA contrary to the intent of Congress. First, studies demonstrate that the number of claims filed rise with increases in benefits.[28] Second, *Hilyer* so widens the scope of the LHWCA

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[26] 44 Social Security Bulletin, No. 9 (September, 1981), p. 9.

[27] "Business Insurance", November 8, 1982, p. 55.

[28] *See, e.g., Comptroller General's Report*, p. 14; App. E *Shipbuilders Council Report*, p. 25.

that contested claims will proliferate when the new fringe benefit wage concept is applied to the thousands of LHWCA claims each year, thereby exacerbating the current administrative logjam. The resulting delay and uncertainty in payment of benefits is contrary to the central purpose of the Act, which is a voluntary payment system in which 96% of the claims are resolved without formal adjudication.[29]

Third, the court below obviously did not consider that a myriad of fringe benefit plans are contributed to by employers. Many plans, do not utilize defined contribution funding but employ "defined benefit" funding.[30] Employer contributions to those funds will vary according to actuarial assumptions.[31] The value to a given employee under these various fringe benefit plans will be vigorously disputed, resulting in delayed payment of benefits. For example, Hilyer's union trust fund involved a defined contribution plan. The lower court simplistically and erroneously equated the employer's hourly cost of funding this plan to a tort type concept of replacement of all "value received" by Hilyer. Of course, in workers' compensation law, there is no such concept nor an intent to make claimants whole. Fourth, *Hilyer* authorizes a costly double recovery never contemplated by Congress which permits the survivor to retain the actual fringe benefits purchased by employer contributions, and also to receive an LHWCA death benefit based in part on the "value" of the same contributions. The anomaly of this duplication somehow escaped notice below.

Finally, problems associated with high costs and administrative delay will be further exacerbated if the *Hilyer* rule is applied retroactively through the broad

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[29] *See, Comptroller General's Report*, p. 5.

[30] App. F, Supplemental Agreement Covering Pension Plan, Exhibit A to Agreement between General Motors Corporation and UAW dated March 21, 1982, a defined benefit plan.

[31] *See Alabama Power Co. v. Davis*, 431 U.S. 581, 594 n.18 (1977).

reopening provision of the Act.[32] Thousands of cases are currently subject to reopening. Since a claimant's attorney's fee under the LHWCA depends not upon the amount of recovery but, rather, upon the successful prosecution of a claim, the financial incentive for claimants' attorneys to reopen cases in order to obtain higher benefits would be overpowering. The impact of this probable deluge of petitions for modification would impose additional unanticipated costs upon self-insurers, who are presently under inordinate financial burdens imposed by this expensive legislation. The National Council is also greatly concerned by the intolerable hardship which the *Hilyer* rule will impose on its employees who are entitled to receive prompt determination of their rights, payment of benefits and return to productive lives.

IV. LHWCA "WAGES", IF SUBJECT TO JUDICIAL REDEFINITION AT ALL, SHOULD BE CONSTRUED TO MEAN NET AFTER-TAX WAGES.

Unlike Congress, which gave "the most careful consideration to the recommendations of the National Commission on State Workmen's Compensation Laws", *supra*, p. 16 n.14, the Court of Appeals seemed unaware of the economic distortion resulting from its narrow focus upon the "value" of employer contributions. 670 F.2d at 213. It should have recognized, as did the National Commission, the "inequities" in calculating tax-free benefits on the basis of pre-tax gross wages. *Commission Report*, p. 18. Factoring the cost of fringe benefits into average weekly wages would compound such inequities:

> While workmen's compensation should protect remuneration (earnings plus supplements), it is net remuneration, not total remuneration that is the relevant basis for workmen's compensation benefits.

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[32] *See* 33 U.S.C. § 922 (1979). Compensation benefits for loss of wage earning capacity, permanent total and death benefits are potentially lifetime payments and would always be subject to reopening. 33 U.S.C. §§ 908(a), (c)(21), 909.

> Net remuneration takes account of payroll taxes and job-related expenses incurred by a worker.
>
> * * * Because workmen's compensation benefits are tied to basic wages and salaries, and because the benefits are tax-free, workmen's compensation benefits have tended to become more attractive relative to a worker's spendable earnings. * * * Because the income tax is progressive, tax-free benefits set as a percentage of pre-tax earnings would tend to approach or even surpass post-tax earnings for high wage workers. *Id.*, pp. 54-55.

Like fringe benefits, income taxes were insignificant factors in 1927, when the LHWCA was enacted. Social Security taxes did not even exist. *Commission Report*, p. 55 (table 3.2). That is hardly true today. The gap between gross wages and spendable earnings has widened considerably. Although the tax impact of wages has changed dramatically, the wage-replacement rationale of the LHWCA has not. *See Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 520 n.16 (1981). Congress set a benefit level "commensurate with present day salaries and with the needs of injured workers whose sole support would be payments under the Act." *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 262 (1977).

A similar wage-based measure of pecuniary benefits at stake in *Norfolk & Western R. Co. v. Liepelt*, 444 U.S. 490 (1980), prompted this Court to observe:

> * * * The amount of money that a wage earner is able to contribute to the support of his family is unquestionably affected by the amount of the tax he must pay to the Federal Government. It is his after-tax income, rather than his gross income before taxes, that provides the only realistic measure of his ability to support his family. It follows inexorably that the wage earner's income tax is a relevant factor in calculating the monetary loss suffered by his dependents when he dies. 444 U.S. at 493-94.

While *Liepelt* was an action under the Federal Employers' Liability Act, its focus upon after-tax earnings

embraces a principle of "general applicability" which furthers "strong federal policies of fairness and efficiency in litigation of federal claims." *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 487 and n.17 (1981). Lower federal courts have already held that *Liepelt* requires income taxes to be subtracted from wage calculations in LHWCA actions against vessel owners. *Rother v. Interstate and Ocean Transport Co.*, 540 F. Supp. 477, 486 (E.D. Pa. 1982). *See Fanetti v. Hellenic Lines Ltd.*, 678 F.2d 424, 431 (2d Cir. 1982). It is but one step further to hold that *Liepelt* also requires the deduction of income taxes from weekly wages in calculating LHWCA benefits.

That is a step recommended by the National Commission, but not approved by Congress. Nevertheless, if the 1927 "wages" definition may be stretched to cover abstract "values" never contemplated by Congress, surely there can be no barrier to extending *Liepelt* to all wage calculations under the LHWCA. To be sure, such an extension would add to the administrative burdens, delay the processing of claims, retard the delivery of benefits, and make the existing caseload insurmountable. However, affirming *Hilyer* would produce the same consequences. No further harm could result by restoring logical balance to the measurement of wages.

V. IN VIEW OF ERISA'S BROAD COVERAGE, THE LHWCA SHOULD NOT BE CONSTRUED AS IMPOSING ADDED BURDENS ON THE FUNDING OF EMPLOYEE BENEFIT PLANS.

Finally, *Hilyer* is a move in the wrong direction for an additional reason not yet identified by the parties or other *amici*. Not only is its expansion of the "wages" definition unwarranted by the language or history of the LHWCA, but the disastrous financial impact of that decision is matched only by its disruptive intrusion into other major legislative programs.

Somewhat disparagingly, the Court of Appeals thought that employee benefit plans "are no more than a channel"

for providing fringe benefits. 670 F.2d at 211. It was not troubled by the undisputed fact that the benefit plans were created by a collective bargaining agreement in which the employer's payment of contributions was stipulated to constitute a complete discharge of its financial obligations to the plans.[33]

If further reason is needed to demonstrate that such employer contributions are not a proper concern of the LHWCA, the very existence of the Employee's Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* (ERISA), militates against a judicial extension of the former Act into the domain served by the latter. ERISA regulates the substantive terms of pension plans, setting standards for plan funding and limits on the eligibility requirements an employee must meet. *International Brotherhood v. Daniel*, 439 U.S. 551, 569 (1979). It permits employers and unions to negotiate agreements which define the level and duration of employer contributions to the plans and which limit the employer's financial obligations thereunder. For example, if ERISA was in effect at the time of Hilyer's death,[34] its comprehensive provisions would govern the defined contribution plans here in question, 29 U.S.C. §§ 1002(1), (2), (34), 1003(a).

However, under a *Hilyer* regimen, the LHWCA would disregard all negotiated limitations on employer liability, permitted by ERISA, and impose a new duty to pay benefits in exact proportion to the old and fully-discharged obligation to pay contributions. Because the level of payments are fixed by agreement, 29 U.S.C. § 1002(34), and are thus "identifiable and calculable", in contrast to "de-

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[33] See Laborers District Council Pension and Disability Trust Fund No. 3, March 1972, as amended, pp. 17-18 (contained in Joint Apx. pp. 31-32, filed below).

[34] While ERISA may or may not control disposition of this particular case, *compare Malone v. White Motor Corp.*, 435 U.S. 497, 499 n.1 (1978), *with Employee Benefits Committee v. Pascoe*, 679 F.2d 1319, 1323 n.5 (9th Cir. 1982), it would be dangerous to ignore its implications.

fined benefit" plans, § 1002(35), participation in a defined contribution plan would thus become a trap for the unwary employer. Once discharged of all financial obligations under ERISA, the employer would incur them again under LHWCA. Since ERISA was designed to promote "a system of private pensions by giving employers avenues for cutting the cost", *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. at 517, there can be no room for a construction of LHWCA which would provide disincentives and burdens additional to those undertaken contractually. Such an interpretation of one Act at the expense of the other could serve no legitimate purpose. *International Brotherhood v. Daniel*, 439 U.S. at 569-70.

Another aspect of ERISA is implicated. The LHWCA applies to this case only because it was incorporated into the District of Columbia Workmen's Compensation Act. For purposes of ERISA as well as the LHWCA, the DCWCA is a "State" law, 29 U.S.C. §§ 1002 (10), 1144(c)(1); 33 U.S.C. § 902(15), subject to pre-emption under 29 U.S.C. § 1144(a), insofar as it "may now or hereafter relate to any employee benefit plan" covered by ERISA. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. at 522.

As construed by *Hilyer*, the DCWCA is potentially as vulnerable as the Connecticut statute invalidated in *Stone & Webster Eng. Corp. v. Ilsley*, 518 F. Supp. 1297 (D. Conn. 1981), *aff'd*, —— F.2d —— (2d Cir. 1982). That statute required employers to contribute to employee welfare plans even as to disabled former employees receiving workers' compensation. Because that law added a burden not imposed by private plans, it encroached on the plans and thus, under *Alessi*, was pre-empted by ERISA. *Id.*, —— F.2d —— (slip op., p. 15). *See Dawson v. Whaland*, 529 F. Supp. 626 (D.N.H. 1982).

Similarly, *Hilyer* redirects the contributions from one pocket to another. It dictates that contributions no longer payable to an ERISA plan must now be paid indefinitely,

in the form of benefits, to an ineligible beneficiary under the plan. Here, as in *Ilsley*, the private agreement of the parties to an ERISA plan is upset by an intrusive state law.

> It is of no moment that [such a law] intrudes indirectly, through a workers' compensation law rather than directly, through a statute called "pension regulation". ERISA makes clear that even indirect state action bearing on private pensions may encroach upon the area of exclusive federal concern.

Alessi v. Raybestos-Manhattan, Inc., 451 U.S. at 525. *Hilyer* plunges headlong into a gray area of ERISA, giving rise to difficult issues whose resolution is far from clear. That area is being explored in *Delta Air Lines, Inc. v. Kramarsky*, 666 F.2d 21 (2d Cir. 1981), *prob. juris noted*, 102 S. Ct. 1968 (1982). Meanwhile, sound judicial policy indicates a circumspect avoidance of collision with a Congressional program whose contours are still being shaped.

CONCLUSION

For all of the foregoing reasons, the National Council of Self-Insurers submits that the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

THOMAS E. CINNAMOND
H. THOMAS HOWELL
RUDOLPH L. ROSE
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Counsel for National Council of Self-Insurers, Amicus Curiae

November 18, 1982

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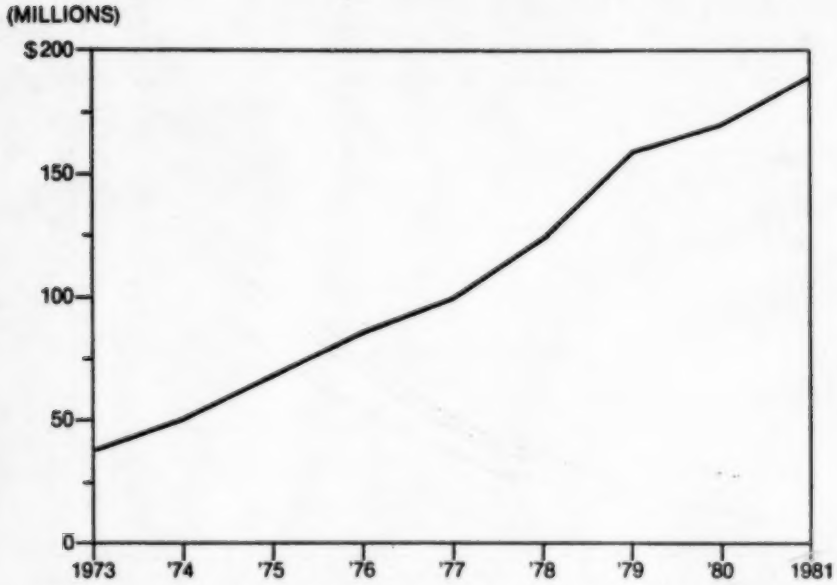
APPENDIX A

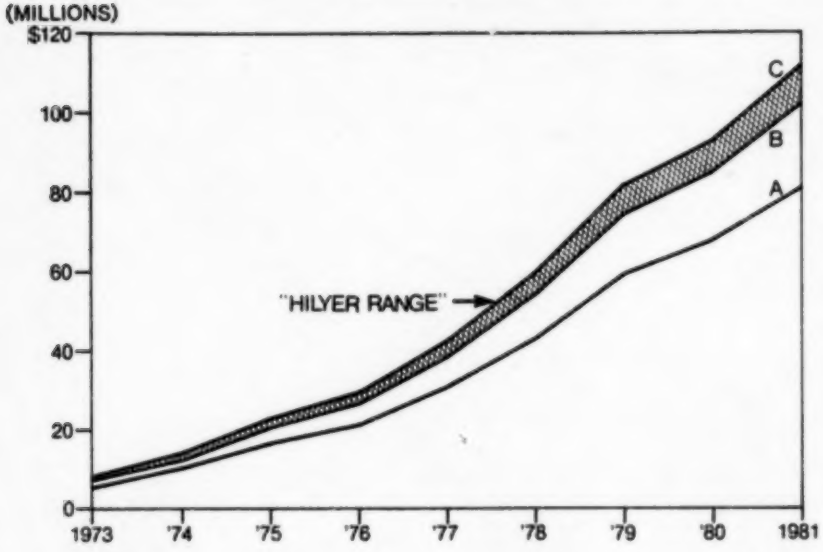
TOTAL WORKERS' COMPENSATION CASH INDEMNITY PAID UNDER LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT 1973-1981



Figures computed on actual compensation paid under LHWCA and its extensions, excluding the District of Columbia Workmen's Compensation Act, on a calendar year basis as reported by Employment Standards Administration, Department of Labor. *See* App. D, Letter from Neil A. Montone, Associate Director of Longshore and Harbor Workers' Compensation, Employment Standards Administration, Department of Labor, enclosing Summaries of Compensation Payments by Insurance Carriers and Self Insured Employers under the LHWCA 1973-1981.

APPENDIX B

SELF – INSURERS' WORKERS' COMPENSATION CASH INDEMNITY PAID UNDER LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT WITH ESTIMATED "HILYER RANGE" 1973-1981



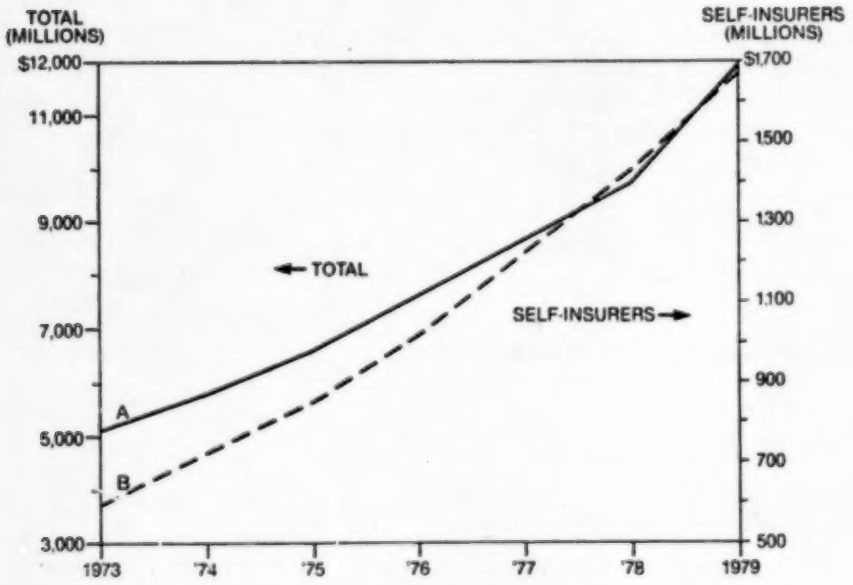
Figures on actual compensation paid under the LHWCA and its extensions excluding the District of Columbia Workmen's Compensation Act (Line "A") computed on a calendar year basis as reported by Employment Standards Administration, Department of Labor. *See* App. D.

Line "A"—reflects the 1,337% increase of compensation payments by self-insurers to claimants under the Act in less than a decade.

Line "B"—represents the "Hilyer Range", *i.e.* an additional 26% and *Line "C"* an additional 38% increase in benefits that would be paid under the Act by self-insurers, according to the National Council survey, if fringe benefits are added to the LHWCA average weekly wage.

APPENDIX C

WORKERS' COMPENSATION PAID IN UNITED STATES 1973-1979



Based upon data published by the Social Security Administration. *See* 44 Social Security Bulletin No. 9, September, 1981; 42 Social Security Bulletin No. 5, May, 1979. Figures include only compensation and medical benefits paid to claimants under state and federal workers' compensation programs.

Line "A"—depicts the 133% increase in total workers' compensation benefits paid under the various state and federal programs in the past nine years and is read along the left axis of the graph.

Line "B"—depicts the 240% increase in benefits paid by self-insurers alone under the various state and federal programs and is read along the right axis of the graph.

Figures for 1977 are not included and are interpolated from the prior and subsequent years.

APPENDIX D

U.S. DEPARTMENT OF LABOR

[SEAL]

Employment Standards Administration
Office of Workers' Compensation Programs
Division of Longshore and
Harbor Workers' Compensation
Washington, D.C. 20210

File Number:

Nov. 10, 1982

Mr. Thomas E. Cimmond
Semmes, Bowen & Semmes
10 Light Street
Baltimore, MD 21202

Dear Mr. Cimmond:

In response to your recent inquiries regarding the number of injuries reported under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) Program and the amounts of compensation paid by insurance carriers, self-insured employers, and the Special Fund for the periods 1973 to 1981 under the LHWCA program, I am providing you the following information:

Enclosure 1—the total number of injuries reported under the LHWCA program for the period FY 1973 to FY 1981.

Enclosure 2—the total number of lost-time injuries reported under LHWCA program (lost-time injury is an injury which results in death or loss of time from work beyond the day or shift of work). The lost-time injury count is included in the total injury count in Enclosure 1.

Enclosure 3—a. Summary of compensation payments reported under the LHWCA program, excluding the District of Columbia Compensation Act, by insurance companies and self-insured employers from CY 1973-1981.

b. Summary of compensation payments from the LHWCA Special Fund, excluding the District of Columbia Compensation Act.

Enclosure 4—Summary of compensation payments reported under the LHWCA program, excluding the District of Columbia Compensation Act, by self-insured employers *only* from CY 1973-1981. These amounts are included in the amounts indicated in Enclosure 3a.

If I can provide additional information, please do not hesitate to contact me.

Sincerely,

/s/ Michael E. Condron
NEIL A. MONTONE
Associate Director,
Longshore and Harbor
Workers' Compensation

Enclosures

ENCLOSURE 1

INJURIES REPORTED

Fiscal Year	LHWCA [2]	+	DCCA [3]	=	Total
73	105,384		28,681		134,065
74	113,846		22,486		136,332
75	166,367		31,969		198,336
76 [1]	252,679		38,896		291,575
77	205,584		29,804		235,388
78	217,367		29,184		246,551
79	226,019		31,542		257,561
80	238,274		30,329		268,603
81	250,422		32,475		282,897

[1] Includes FY 1976 transition period from July through September 1976.

[2] Longshoremen's and Harbor Workers' Compensation Act, Defense Base Act, Outer Continental Shelf Lands and Nonappropriated Fund Instrumentalities Act.

[3] District of Columbia Workmen's Compensation Act (Passed 5/17/28).

ENCLOSURE 2

LOST-TIME INJURIES REPORTED

Fiscal Year	LHWCA [2]	+	DCCA [3]	=	Total
73	23,022		7,368		30,390
74	25,669		6,450		32,119
75	37,532		9,267		46,799
76 [1]	50,513		11,967		62,480
77	41,031		10,950		51,981
78	46,628		9,648		56,276
79	56,756		11,886		68,642
80	59,594		10,347		69,941
81	62,713		9,170		71,883

[1] Includes FY 1976 transition period from July through September 1976.

[2] Longshoremen's and Harbor Workers' Compensation Act, Defense Base Act, Outer Continental Shelf Lands Act and Nonappropriated Fund Instrumentalities Act.

[3] District of Columbia Workmen's Compensation Act (Passed 5/17/28).

ENCLOSURE 3a & b

U.S. DEPARTMENT OF LABOR

EMPLOYMENT STANDARDS ADMINISTRATION
Division of Longshoremen's and Harbor Workers' Compensation

Summary of compensation payments reported by insurance companies and self-insured employers.

CY 1973-1981

Longshore Act

1973	$ 37,824,475.04
1974	$ 50,119,640.35
1975	$ 68,123,622.45
1976	$ 86,318,282.62
1977	$ 99,736,761.52
1978	$123,522,575.56
1979	$158,589,795.83
1980	$169,625,502.00
1981	$189,595,663.98

Summary of compensation payments from the LHWCA Special Fund:

Fiscal Years 1973-1981

1973	$ 32,194.00
1974	2,425,357.00
1975	1,979,730.00
1976	3,525,529.00
1977	2,447,054.00
1978	3,133,393.00
1979	5,080,292.00
1980	8,540,009.00
1981	12,490,984.00

ENCLOSURE 4

U.S. DEPARTMENT OF LABOR

EMPLOYMENT STANDARDS ADMINISTRATION
Division of Longshoremen's and Harbor Workers' Compensation

Summary of compensation payments reported by self-insured employers only

CY 1973-1981

	Longshore Act
1973	$ 5,675,888.53
1974	10,068,304.89
1975	16,247,758.98
1976	20,952,490.76
1977	30,428,596.75
1978	42,911,725.39
1979	58,952,891.94
1980	67,231,789.99
1981	80,597,664.75

APPENDIX E

SHIPBUILDERS COUNCIL OF AMERICA

A Report on
Longshoremen's &
Harbor Workers'
Compensation Act Experience
October 1978

TILLINGHAST, NELSON & WARREN, INC.
Actuaries/Consultants

ORIGINS OF THE DATA

TN&W has used data supplied by members of the SCA. The data were not audited, because such an audit would have been beyond the scope of this study.

Some data were gathered by SCA members in response to data requests designed by TN&W. Other data were gathered by SCA members for earlier studies, or drawn from insurance industry sources or United States Government agencies.

TN&W makes no guarantee as to the accuracy of the data used in this study, but we do believe that they are properly assembled.

Most of the analysis in this report is based on combined indemnity and medical payments for claims with $5,000 or more of indemnity. When other SCA member data are presented, the exception is noted.

Data drawn from self-insured SCA members were divided into two categories, with further divisions of each:

1. Fiscal data from general ledger worksheets:
   - Calendar-year claim payments
   - Calendar-year claims incurred

- Number of new claims
- Number of "production and maintenance" employees
- Payrolls for "production and maintenance" employees

2. Claim detail from individual claim files:

- Occurrence date
- Closing date
- Jurisdiction (federal or state)
- Claim payments by calendar year
- Estimates of unpaid liabilities

Claim payments and reserves list indemnity payments and medical payments separately. Claims of the last seven years are subdivided into three categories: fatal, permanent and total disability, and other compensable cases of $5,000 or more.

To the extent possible, TN&W conclusions are based on *payments* rather than on estimates of unpaid liability. Restricting the data base to paid items removes the subjectivity inherent in estimates which result from differing corporate philosophies.

The paid data were arranged by year of occurrence in order to study payment patterns for fixed bodies of claims. These fixed bodies of claims are termed "claim years"; thus all claims occurring in 1970 are combined and are termed "Claim Year 1970."

As a claim year matures—that is, as it gets older—more payments accumulate on those particular claims. Thus the earlier claim years included in the study would have more accumulated payments than would more recent years. By way of illustration: As of December 31, 1976, Claim Year 1975 would be considered 24 months old. On the same date, Claim Year 1976 would be 12 months old. And so on.

TABLE 1.

General Ledger Data

Fiscal Year	Number of Production and Maintenance Employees	Production and Maintenance Payroll (000)	Workers' Compensation Benefits Paid (000)	Number of New Cases
(1)	(2)	(3)	(4)	(5)
1970	20,595	$151,711	$2,025	3,338
1971	18,446	145,436	2,169	3,165
1972	17,417	146,930	2,284	3,298
1973	17,380	158,345	2,999	3,051
1974	15,324	160,384	4,181	2,761
1975	17,086	184,032	6,211	3,360
1976	15,872	189,486	7,309	4,884

Source: Shipbuilders Council of America

The figures in Column (2) represent the full complement of production and maintenance employees of the five shipyards which participated in this survey.

The figures in Column (4) represent all payments made in a particular fiscal year for claims which occurred in that year and in earlier years.

TABLE 2.

All Reported Cases
SCA Data

Claim Year	Number of Claims	Claim Payments to 12/31/76	Claim Year Age in Months @ 12/31/76
(1)	(2)	(3)	(4)
1970	59	$ 776,195	84
1971	63	828,264	72
1972	95	1,157,[illegible]5	60
1973	141	1,596,951	48
1974	199	1,808,588	36
1975	148	1,187,051	24
1976	147	541,114	12
7 years	852	$7,895,498	

The paid data were projected by formulas to 84 months' payout costs for each claim year. As of December 31, 1976, Claim Year 1970 was 84 months mature. Claim Year 1971 was 72 months mature, and was developed to 84 months. Claim Year 1972 was 60 months mature, and was developed to 72 and 84 months, and so forth. Claim Year 1976 was only 12 months mature as of December 31, 1976, and therefore was developed to 24, 36, 48, 60, 72, and 84 months. The data obtained from the participating shipyards, arranged in order of claim year, are shown in Table 2.

Table 3 shows the actual SCA data and TN&W development to a uniform 84 months for each claim year.

* * * *

1. The rate of increase in compensation costs (per employee) is several times the increase in payroll.

TABLE 4.
Payroll Increases vs. Workers' Compensation Cost Increases

Claim Year	Payroll Per Employee	Compounded Increase	Workers' Compensation Benefits Per Employee	Compounded Increase
(1)	(2)	(3)	(4)	(5)
1970	$ 7,366	Base	$118.00	Base
1971	7,884	7.0%	186.42	58.0%
1972	8,436	14.5	258.95	119.4
1973	9,111	23.7	318.40	169.8
1974	10,466	42.1	452.72	283.7
1975	10,771	46.2	442.60	275.1
1976	11,938	62.1	710.44	502.1
7-Year Average		8.5%		31.5%

Source:

Column (2): Table 1, Column (3) ÷ Column (2)
Column (4): Appendix 1, Column (10)

Over the seven-year period 1970-1976, increases in payroll per employee averaged 8.5% per year; increases in workers' compensation benefits per employee averaged 31.5%. The compounded increase in benefits per employee is 808.5% greater than the compounded increase in payroll (502.1%÷62.1%).

2. After 1972, benefits were 256.2% higher than in the period 1970-1972, and were increasing at 165.4% the rate of pre-1973 benefits.

The benefit costs shown on Table 4 were split into two time periods: 1970 through 1972 and 1973 through 1976. A comparison of the two periods shows that the earlier (1970-1972) period was characterized by modest levels and increases, while the later (1973-1976) period was characterized by high levels and large increases. Table 5 is a summary of average cost per employee from Table 4.

TABLE 5.

Workers' Compensation Cost Averages and Increase Rates Before and After the November 1972 Revision (Average Cost Per Employee)

	Workers' Compensation Benefits Per Employee	Annual Increase In Per-Employee Benefit Cost
	(1)	(2)
1970-1972 Average	$187.79	$ 70.48
1973-1976 Average	481.04	116.60
Percentage Change	256.2%	165.4%

Source: Table 4

3. The liberality of the LHW Act is encouraging misuse of benefits.

When employment is high in the shipyards, LHW Act costs are below average; when employment is low, the costs are above average. This suggests a tendency to

TABLE 6.

Employment and Workers' Compensation Costs
SCA Data

Claim Year	Number of Employees	Workers' Compensation Costs
(1)	(2)	(3)
1970	20,595	$ 2,430,210
1971	18,446	3,438,703
1972	17,417	4,510,132
1973	17,380	5,533,792
1974	15,324	6,937,481
1975	17,086	7,562,264
1976	15,872	11,276,104

Source: Appendix 1

misuse LHW Act benefits to provide a distorted form of unemployment insurance. Misuse is common under present-day workers' compensation laws, and appears to have been growing in magnitude since 1972. The phenomenon is best revealed by examining employment levels and workers' compensation costs, as set out in Table 6 below.

There is a very dependable relationship between a *decreasing* workforce and *increasing* benefits. And, when the workforce increases, benefits tend to increase at slower rates. For example, when employment increased in 1975, the increase in benefits was the smallest in the seven-year sample. In contrast, when employment decreased in 1976, benefit estimates rose to record levels. Workers' compensation benefits appear to be misused as a substitute for unemployment benefits.

APPENDIX F

Supplemental
Agreement

Covering

PENSION PLAN

Exhibit A

to

AGREEMENT

between

GENERAL MOTORS CORPORATION

and

UAW

dated

March 21, 1982

* * * *

In the event that the Plan is disapproved by either the Board of Directors or the Stockholders of the Corporation, the Corporation within thirty days after any such disapproval will give written notice thereof to the Union and this agreement shall thereupon have no force or effect. In that event the matters covered by this agreement shall be the subject of further negotiation between the Corporation and the Union. In addition, if the trustee has paid any excess amounts referred to in the paragraph immediately above prior to any such disapproval by the Stockholders of the Corporation, the Corporation will reimburse the trustee for the full amount of such payments.

Section 2. Financing

(a) A trustee or an insurance company, or both, shall be designated by the Corporation, and a trust agreement

or contract, or both, executed between the Corporation and such trustee or insurance company, or both, under the terms of which a pension fund or insured fund, shall be established to receive and hold contributions payable by the Corporation, interest, and other income, and to pay the pensions and supplements provided by the Plan.

(b) Subject to the provisions of Section 2(d) with respect to the funding of early retirement and interim supplements, the Corporation agrees to pay over irrevocably to the trustee or insurance company during the period of this agreement, contributions or payments for the Plan equal to the sum of (i) and (ii) below as determined and certified as of each anniversary of the effective date of the Plan by one or more actuaries chosen by, but independent of, the Corporation, and qualified through Fellowship in the Society of Actuaries (hereinafter referred to as the actuary). Such contributions or payments for any year may be made not later than the date on which such contributions are required by law to be made for the purpose of crediting such contributions to such year under the minimum funding standards of the Employee Retirement Income Security Act of 1974:

(i) the annual "current service" or "normal cost" contribution attributable to a year's cost accruals in respect of assumed continuous service after each such anniversary date, and

(ii) the "prior service contribution" computed as that part of the present value, at each such anniversary date, of the prospective pensions payable under the Plan for employes, pensioners and former employes who are entitled to a deferred pension then covered by the Plan which is in excess of:

(aa) the value of the trust fund, as then comprised of any contracts and total other assets, invested and uninvested, such total assets being valued on a basis at least equal to the total cost thereof, plus

(bb) the then present value of the prospective "current service" or "normal cost" contributions determined by the actuary in accordance with (i) above,

such excess part being amortized according to the following schedule:

(1) in respect of the portion of such excess part attributable to the level of benefits in effect prior to October 1, 1979—the fifty-ninth anniversary of the Corporation's pension plan (October 1, 2009), and

(2) in respect to the portion of such excess part attributable to the increase in the level of benefits established by amendments to the Corporation's pension plan effective on or after October 1, 1979—the thirtieth anniversary of the date on which such increase in the level of benefits becomes effective.

(c) The Corporation may contribute or pay additional amounts to the trustee or insurance company, or both, under (b) above in any year without such additional amounts being construed to reduce any thirty-year period for the completion of the "prior service contributions" of subsection (b) (ii) above. If the Corporation has contributed any such additional amounts prior to any anniversary date of the Corporation's pension plan or shall contribute any such additional amounts prior to any anniversary date of the Plan falling within the duration of this agreement, the Corporation may as of such anniversary, contribute a lesser amount than otherwise determined by (b) above for such anniversary, provided that the value of any contracts and total other assets as valued in accordance with (b) (ii) (aa) above at such anniversary, shall not be less than the amount estimated by the actuary to be the value as if contributions and payments up to and including such anniversary date had been made as provided in (b) above and no additional amounts had been contributed or paid prior to such anniversary.

(d) The Corporation will pay to the trustee or insurance company as of each anniversary of the Plan during the period of this agreement, supplemental contributions or payments to fund the cost of the early retirement and interim supplements of the Plan on a basis approved by the actuary, provided that as of each anniversary the balance in the fund attributable to such supplements shall not be less than zero. If the basis of funding such supplements is not the same as that provided for in Section 2(b), then Section 2(b) and the report and the statement covered by Section 3(a)(5)(iii) and (v) shall exclude any amounts attributable to such supplements.

(e) The Corporation by payment of the contributions or amounts as hereinbefore provided in this section shall be relieved of any further liability, and pensions and supplements shall be payable only from the trust fund or the insured fund or both.

(f) The Corporation may charge to the fund certain expenses necessary for the proper administration of the Plan as follows:

(i) fees for trustee banks and investment advisors, custodian and checkwriting services, and systems and programming services; and

(ii) the direct cost of benefit administration performed by the Corporation for the Hourly-Rate Employes Pension Plan.

Section 3. Administration

(a) Board of Administration

(1) There shall be established a central Board of Administration hereinafter referred to as the Board, composed of six members, three appointed by the Corporation and three by the Union. Each member of the Board shall have an alternate. In the event a member is absent from a meeting of the Board, his alternate may attend

and when in attendance shall exercise the duties of the member. Either the Corporation or the Union at any time may remove a member or alternate appointed by it and may appoint a member or alternate to fill any vacancy among members or alternates appointed by it.

No person shall act as a member of the Board of Administration or as an alternate for such member unless notice of his appointment has been given in writing by the party making the appointment to the other party.

(2) The Board shall meet at such times and for such periods for the transaction of necessary business as may be mutually agreed upon by its members.

* * * *

Employee Retirement Income Security Act of 1974 or regulations thereunder (excluding an investment manager who is an employe of the Corporation); may modify any such trust agreement from time to time accomplish the purposes of this Plan; may remove any trustee, and select any successor trustee; and select and change insurance companies.

Section 2. Contributions

(a) The Corporation, subject to Article IX, Section 1, shall make such contributions to the trustee or pay such premiums under any insured contract for the purposes of providing pensions and supplements under the Plan as shall be required under accepted actuarial principles and Title I of the Employee Retirement Income Security Act of 1974 to maintain the Plan and pension or insured fund in a sound condition and shall pay for expenses incident to the operation and management of the Plan.

(b) No employee shall be required to make any contributions to the Plan.

Section 3. Irrevocability

(a) The Corporation shall have no right, title or interest in the contributions made by it to the trustee and no part of the pension or insured fund shall revert to the Corporation, except that after satisfaction of all liabilities of the Plan as set forth in Article IX, such contributions as may have been made by the Corporation as the result of overpayments may revert to the Corporation.

(b) The pension benefits and supplements of the Plan shall be only such as can be provided by the assets of the pension fund or by any insured fund and there shall be no liability or obligation on the part of the Corporation to make any further contributions to the trustee or insurance company in event of * * *

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